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Essay

Exorcising Langdell's Ghost: Structuring a Criminal Procedure Casebook for How Lawyers Really Think

by
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A ghost haunts traditional law school casebooks: the ghost of Christopher Columbus Langdell. Langdell founded the case method that has dominated law school education for so long. Langdell's method has been criticized for offering no clear guidance on legal reasoning, hiding black letter law, unnecessarily bruising student egos, and ignoring the artistry of lawyering and the distinct value that other disciplines offer to legal analysis.[1] This essay embraces these criticisms, concluding that the case method as traditionally conceived should not be the guiding philosophy for teaching law.[2] We must exorcise Langdell's ghost.

This essay will add to the earlier debate on law school teaching methodology by applying these criticisms of the case method to the design of a casebook, specifically a new criminal procedure text. Critics of the case method have typically focused on changing what teachers do in

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1. These criticisms are explored *infra* at text accompanying notes 6-26.

2. For effective analyses of the reasons for siding with the "cons" in the debate over the pros and cons of the case method, see, *e.g.*, June Cicero, *Piercing the Socratic Veil: Adding an Active Learning Alternative in Legal Education*, 15 WM. MITCHELL L. REV. 1011 (1989) (suggesting more active learning is needed); Steven I. Friedland, *The Use of Appellate Case Report Analysis in Modern Legal Education: How Much Is Too Much?*, 10 NOVA L. REV. 495 (1986) (decrying the obsession with appellate case analysis); Nancy L. Schultz, *How Do Lawyers Really Think?*, 42 J. LEGAL EDUC. (forthcoming March 1992) (manuscript at 1, 10-17) (emphasizing need to integrate doctrine and skills).

the classroom (arguing, for example, that learning should be made more active through the use of simulations and small group problem-solving exercises)[3] without focusing significantly on the primary tool that teachers use: the casebook.

I offer a criminal procedure casebook as an example for two simple reasons. First, I teach criminal procedure. Second, the casebooks in this subject have lagged behind experimental efforts at replacing the case method in other subject areas. Designing a better book, however, first requires an understanding of how criminal procedure casebooks are now designed. This essay, therefore, includes a critique of Welsh White and James Tomkovicz' *Criminal Procedure: Constitutional Constraints Upon Investigation and Proof,* one of the newest and best criminal procedure casebooks on the market.[4] The distinguishing feature of this book is its thorough use of complex and interesting problems, an approach taken by no other criminal procedure casebook. Despite this innovation, however, White and Tomkovicz' text is still bound by the assumptions of the Langdellian case method. Those assumptions are: (1) law is a "science" distinct from other disciplines and therefore is best understood without reference to them; (2) this science is best studied through exclusive focus on appellate cases; and consequently (3) the "art" of lawyering (for example, interviewing, counseling, and negotiating) is not a fit subject for a "scientific" law school education.[5]

A casebook written in an alternative model—one that rejects much of Langdell's basic teachings—would have four major goals: first, integrating theory and practice in the way that the best practicing lawyers do; second, expanding the ways in which students learn by doing in order to teach them more about how practicing lawyers reason and ply their trade; third, making the artistry of lawyering as important a subject as appellate case analysis; and, fourth, teaching students to use the tools of

3. *See* sources cited *supra* note 2 and *infra* notes 16-23.

4. WELSH S. WHITE & JAMES J. TOMKOVICZ, CRIMINAL PROCEDURE: CONSTITUTIONAL CONSTRAINTS UPON INVESTIGATION AND PROOF (1990).

5. *See infra* text accompanying notes 6-26. The "Langdellian case method," as used here, means the long dominant method of legal education that has grown from Langdell's philosophy, regardless of whether Langdell himself consciously subscribed to all the details of, or variations on, that method or fully thought through its implications. *See* ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S 279 (1983) ("[W]e may be sure that Langdell will continue to be blamed for things that he never believed or at least never understood."). The three assumptions noted in the text, while likely accurate statements of Langdell's underlying beliefs, *see infra* text accompanying notes 6-26, are therefore important for another reason: they accurately reflect the unifying notions underlying most of the past and present law professoriate's teaching methodologies. *See infra* text accompanying notes 79-98 (explaining why even the much touted "problem method" is really but one variant on the Langdellian case method).

other disciplines, especially the social sciences, in practicing both the science and art of lawyering. The ultimate purpose of this essay is to suggest how these goals might best be furthered in casebooks.

Part I thus begins by briefly reviewing the history, assumptions, and criticisms of the case method and how it has been used to design casebooks. This review sets the stage for examining the limitations inherent in even the most modern variants of that method in casebook design. Part II illustrates these limitations by evaluating one such modern variant, White and Tomkovicz' text.

Reflecting on these limitations, Part III suggests specific ways to design a criminal procedure casebook that will address the flaws in the case method. The suggested alternative model casebook builds upon developments already occurring elsewhere in the law school curriculum. Still, this model does recognize that there is much of value in the case method. The method is criticized, therefore, not because it has nothing to offer but because it does not have enough. In short, I seek to cast out Langdell's ghost but to respect its legacy.

I. Defining and Critiquing the Case Method

A brief review of the history, approach, and flaws of the case method will help us envision what a casebook seeking to cure those flaws might look like. To that end, we turn now to the latter part of the last century.

Aspiring professions, it has been said, struggle for recognition as fields requiring training in a complex, specialized "science" that uses a methodology distinct from (and perhaps, within the relevant area of expertise, even better than) that of other disciplines.[6] This apparently is what happened with the legal profession in the late nineteenth century. Training in the law office gave way to training in the law school with the arrival of the law's (and thus the law school's) patron saint of law-as-science, Christopher Columbus Langdell.[7]

6. *See* DONALD SCHÖN, THE REFLECTIVE PRACTITIONER: HOW PROFESSIONALS THINK IN ACTION 24-25 (1983).

7. *See* JEROLD S. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA 74-76 (1976) (describing the rise of Langdell's method by the title, "Scientific Expertise: The Triumph of the New Professoriat"). The rise and growing dominance of the case method in the history of legal education are discussed in depth in STEVENS, *supra* note 5. Stevens suggests that the "scientific" approach to law and law teaching was partly successful because of its snobbism. *Id.* at 53, 63. Langdell, of course, introduced his approach at Harvard. *Id.* at 36, 52-53. Other "elite" schools (and those aspiring to be elite) quickly followed suit. *Id.* at 63. Students thus began viewing attending case method schools as a way of improving job marketability. *Id.* Beyond its snobbism, the "scientific" approach to law had

To Langdell, "law was a science, the library was its laboratory, and cases were its natural elements."[8] As a science, law emphatically was *not* "a species of handicraft," to be learned through apprenticeship,[9] but rather a scientific discipline properly studied only by specially trained researchers—law professors.[10] Law professors need not, and indeed should not, have training in practice, but only in law's version of scientific methodology—the case method.[11]

According to Langdell's model, the cases are the *only* source of legal principles and knowledge, the library the only laboratory worthy of the name.[12] Law study, therefore, consists of divining the universal principles that the cases unquestionably embody.[13] To teach students those

other appealing aspects. Notably, the rising class of academic lawyers relished their growing power and influence in the classroom and the drama that went along with the new method. *Id.* Correspondingly, the method was cheap, permitting professors to teach large classes at relatively little cost, a feature welcomed by university administrators. *Id.*

Langdell's teaching philosophy arose at a time when jurisprudence was dominated by "legal formalism," a term used here to describe a system of legal thought dominated by the belief that law could be reduced to a science in which abstract principles dictated "objective" results. *See* Charles C. Goetsch, *The Future of Legal Formalism,* 24 AM. J. LEGAL HIST. 221, 221-23 (1980). The implications of formalism both in Langdell's time and in today's legal thought are beyond the scope of this essay, *see* RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE (1990) (discussing and critiquing various meanings of "formalism"), but it is useful to note that formalist jurisprudence was consistent with, and so offered support for, Langdell's teaching philosophy. It is unlikely, however, that jurisprudential theories had much to do with the dominant focus on the divination of "scientific" principles from cases, for the traditional case method has persisted despite changes in legal jurisprudence. *Compare* Alex M. Johnson, Jr., *Think Like a Lawyer, Work Like a Machine: The Dissonance Between Law School and Law Practice,* 64 S. CAL. L. REV. 1231, 1236-40 & nn.17, 29 (1991) (noting the many changing and competing jurisprudential theories that have challenged Langdellian assumptions) *with* STEVENS, *supra* note 5 at 278 (predicting that this "remarkable and resilient vehicle, the case method, will continue to dominate legal education").

8. AUERBACH, *supra* note 7, at 75; *see also* SCHÖN, *supra* note 6, at 28-29 (noting that despite law's "dubious basis in science," law schools' still-dominant Langdellian methodology fits the view of professional activity as "science").

9. AUERBACH, *supra* note 7, at 76.

10. *See id.* at 75-76.

11. *See id.* at 86-87 (noting the "radical change" at the turn of the century to law faculties comprised mostly of young men with limited, if any, practical experience); *see also* STEVENS, *supra* note 5, at 38 (describing as a "milestone" the appointment of James Barr Ames in 1873 as an assistant professor of law at Harvard because "Ames, a recent Harvard Law graduate who had scarcely practiced law, was exactly the type of professor Langdell demanded"). This disdain of practical legal experience continues among today's law professoriat. *See* RICHARD L. ABEL, AMERICAN LAWYERS 176 (1989) ("few [law professors] today have any experience other than a judicial clerkship and perhaps a year or two in government or a large firm . . . .").

12. Robert Stevens, *Two Cheers for 1870: The American Law School, in* READINGS IN THE HISTORY OF THE AMERICAN LEGAL PROFESSION 220 (Dennis Nolan ed., 1980).

13. Schultz, *supra* note 2, at 3.

principles, the professor is to engage them in the grand discussion of cases we loosely term the "socratic method."[14]

This method, however, has a curious feature. While the approach aspires to teach scientific principles, the students never are told what these principles are. Instead, they are expected to abstract the principles from the cases. Yet, the method for accomplishing this task is never made explicit.[15] One commentator has described the approach as follows:

> The Socratic method, as it is usually administered in the classroom, consists largely of a set of "games," the most popular of which is "Corner," a strategy that bears a striking resemblance to the ancient ploy of Zen masters. The objective in each case is to drive the student into a corner by refuting any position he takes. In being presented with a *zoan* (a Zen question) or a Socratic question, the student is cast on the horns of a dilemma: he is made to feel that there is some answer he must find, but in seeking it out, he begins to despair of finding it because everything he says is rejected as wrong.[16]

As some commentators have observed, this approach breeds student frustration and anomie.[17]

In fact, students do more than simply memorize scientific principles. They learn by doing, and learning by doing should be at the heart of professional training because professionals *are* doers. The case method's great weakness is that it requires only one kind of doing—the reading and synthesizing of appellate cases—and offers insufficient guidance for doing that task well. But because of its emphasis on doing, the method holds within it the key to escape from its own confines. Such an escape

14. Paul N. Savoy, *Toward a New Politics of Legal Education,* 79 YALE L.J. 444, 457-62 (1970).

15. *Id.* at 457.

16. *Id.* at 457-58 (footnotes omitted).

17. This may be for no other reason than that the students are bored. *See, e.g.,* Schultz, *supra* note 2, at 17 ("There is a general perception of ennui, of a 'tuning out' by upper class law students, that . . . is mainly the product of the repetitious approach to law teaching currently employed in most law schools."); Thomas F. Bergin, Jr., *The Law Teacher: A Man Divided Against Himself,* 54 VA. L. REV. 646, 648-49 (1968). ("To be mercifully brief, law school is unmercifully dull. . . . [T]he only skill gained after the first year is the skill of feigning preparedness for class."). It has been suggested as well that while the socratic method spreads "havoc . . . among the egos," Cicero, *supra* note 2, at 1015, it is particularly demoralizing for women. *See* Taunya Lovell Banks, *Gender Bias in the Classroom,* 38 J. LEGAL EDUC. 137, 146 (1988) ("[W]omen are silent because the law school classroom environment, structure, and language tend to exclude women or make them feel inferior."). In addition to scholarly commentators, students have long objected to the case method. Even in 1935 Harvard students complained that: the case method lost its value after the first year; lectures needed to be reintroduced; discussion should replace what had become a "dialogue between the professor and a handful of students in a large class"; and something had to be done about student boredom in the third year. STEVENS, *supra* note 5, at 161.

could be accomplished by broadening the scope of inquiry in each case to include professional practice and artistry. It also would include the recognition that appellate cases can profitably be studied without hiding the legal rules from the students.

Indeed, such a transformation has long been underway in the law school curriculum as a whole. First there came the recognition that Langdell's method "deluded its practitioners into believing that law was science, not policy, and that other scholarly disciplines . . . had nothing to offer."[18] As a result of this recognition, policy is now the subject of much explicit classroom discussion. Nevertheless, the discussion remains limited by the assumption that legal reasoning is unique and by the related tendency to overlook other disciplines, particularly the social sciences, which have much to offer.

Second, growing pressure from the practicing bar and the public has led law schools to provide some practical training, although usually in the context of separate clinical courses, legal writing courses, "skills" courses (relying on simulation), or professional responsibility courses.[19] Indeed, scholarly efforts increasingly are treating what lawyers do and how they do it as a legitimate subject of inquiry,[20] and some of the more progressive law schools accordingly have adopted courses that focus on the *artistry* of law and approaches to lawyerly problem-solving.[21] Unfor-

18. AUERBACH, *supra* note 7, at 80.

19. *See, e.g.,* TERENCE ANDERSON & WILLIAM TWINING, ANALYSIS OF EVIDENCE at xxiii (1991) (the changing legal profession has produced a "strong demand" for law school training in interviewing, counseling, negotiation, and the like); Elizabeth M. Schneider, *Integration of Professional Skills Into the Law School Curriculum: Where We've Been and Where We're Going,* 19 N.M. L. REV. 111, 113 (1989) (observing that while there is some integration of skills training in "traditional" classes, the vast majority of law schools teach skills via a combination of discrete clinical and simulation courses). The pressure from the organized Bar to expand skills training continues and is exemplified by the formation of an ABA Task Force on the subject. *See* ABA TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP, INITIAL BLUEPRINT (Dec. 1989) (unpublished).

20. *See, e.g.,* Stephen Ellmann, *Lawyers and Clients,* 34 UCLA L. REV. 717 (1987) (arguing that while lawyers should protect clients' right to make decisions, lawyers may have to take an active role to assist their clients' decisionmaking); Donald G. Gifford, *The Synthesis of Legal Counseling and Negotiation Models: Preserving Client-Centered Advocacy in the Negotiation Context,* 34 UCLA L. REV. 811 (1987) (proposing a model for client-centered counseling in a negotiation context).

21. One of the most interesting stabs at "artistry" is a new course at the George Washington University Law Center entitled, "Advanced Oral Advocacy." Students study, write, present, and critique speeches, opening and closing arguments, and appellate arguments with the goal of combining sophisticated doctrinal analysis with art and drama. *See* George Washington University Law Center, Looseleaf Supplement to Course Bulletin (1991). Courses in problem-solving now are less experimental and have their own well-known texts. *See, e.g.,* DAVID A. BINDER & PAUL BERGMAN, FACT INVESTIGATION (1984) (textbook teaching the practical skill of fact investigation).

tunately, even these promising changes reflect the dichotomy between "theory" and "practice," with theory still coming first and researchers of theory (the teachers of traditional subjects) still being acclaimed over researchers of practice (the clinicians and legal writing instructors).[22] This dichotomy is unfortunate because:

> The limited focus of most law school classes on derivation of rules and policy considerations from appellate decisions cannot begin to approximate the thinking process that must occur in the mind of the competent attorney. Teaching students to think like lawyers loses much of its meaning if that thinking is not placed in the context of what lawyers actually do. "Acting and thinking must go together—or both are futile." It makes no sense to separate how lawyers think from what they do.[23]

The traditional law school casebook compounds these problems.

The typical casebook, unlike legal education as a whole, probably has changed little since Langdell's day.[24] It likely consists largely of cases, the degree to which they are edited varying with the particular casebook. The cases may be followed by notes and questions that are meant to provoke student thinking about doctrine, but more likely than not are skipped over by most students (especially after the first year), and often are ignored even by professors. A growing number of casebooks do include at least some problems, thereby increasing the students' opportunity for prior reflection on the *application* of legal principles to concrete situations. Unfortunately, the problems generally are not designed to increase student reflection on case-planning, strategy, ethics, negotiation, and the myriad other daily aspects of lawyering life. Additionally, traditional casebooks generally are devoid of the simulations, writing exercises, studies in values, interdisciplinary analyses, and role-playing now

22. Eleanor M. Fox, *The Good Law School, The Good Curriculum, and the Mind and the Heart*, 39 J. LEGAL EDUC. 473, 478 (1989) ("[C]linics . . . existed in the shadow of academic courses. Even though students thrived in clinics, were excited by them, and ranked them among their most rewarding studies, academic faculty considered clinics and clinical faculty second class.").

23. Schultz, *supra* note 2, at 13 (footnotes omitted) (quoting Frank Maher, *Ivory Towers and Concrete Castles: A Hundred Years War*, 15 MELB. U. L. REV. 637, 644 (1986)).

24. *See* STEVENS, *supra* note 5, at 276-78 (noting the "substantive," as opposed to "clinical," law professoriat's historical and continuing resistance to any change in teaching methods and concluding that "teaching by methods other than the [traditional] casebook was probably not congenial to most law professors whose chief and sometimes only skill was the analytical one associated with the parsing of cases"). Absent a statistical study of the nature and content of modern day casebooks, there is admittedly no "hard" data to support my description of the "typical" casebook; casebooks unquestionably vary widely in their approach to teaching. Nevertheless, based on my own experience as a law student and a law professor, and my continuing discussions with colleagues teaching disparate subject matters, I believe that my picture of the "typical" casebook is an accurate one.

so prevalent in the upper-level curriculum outside the traditional courses.[25] By perpetuating Langdell's exclusive focus on the "scientific" analysis of appellate cases, modern casebooks reinforce both the dichotomy between theory and practice and the inattention to professional artistry that characterize the case method. Even the best modern casebooks likely fail to correct these flaws. This truth is effectively illustrated by examining White and Tomkovicz' new criminal procedure text, the subject to which this essay now turns.

II. White and Tomkovicz' Text: An Effort to Rise "Above" the Most Traditional Version of the Case Method

It should now be clear that the most important assumption of the case method is that the close study of appellate cases is the acme of legal education. In the method's most traditional form, cases are studied abstractly, without being placed in the context of the types of situations that bring lawyers to clients in the first place. Part II of this essay examines how White and Tomkovicz' text rises above this most traditional conception of the case method. Part II, however, also points out how the authors have remained tied to the case method's single-minded focus on appellate cases, thereby failing to create a casebook that reflects how practicing lawyers really think.

A. Structure and Content

In the preface to their casebook, White and Tomkovicz identify the incorporation of a "considerable number of problems" as the "most distinctive feature of the book . . . ."[26] In this, they unquestionably are right. Although some texts incorporate a few problems,[27] and separate problem booklets are available,[28] only White and Tomkovicz's text consistently uses the problem method as the central feature of a single casebook. As discussed in Part II.B. of this essay, the authors have done

25. Efforts have begun to expose students to these thinking-by-doing activities earlier in their legal careers, but even these efforts generally remain separate courses from the substantive ones. *See, e.g.*, Dan Braveman, *Law Firm: A First-Year Course on Lawyering*, 39 J. LEGAL EDUC. 501 (1989) (discussing the successes and problems with "Law Firm," a first-year course at Syracuse University College of Law intended to correct the weaknesses of the "traditional" first-year curriculum). Moreover, these modest efforts are hampered by the absence of effective teaching materials. It took two faculty members devoting substantial amounts of three summers to come up with the materials for Syracuse's first-year lawyering course entitled, "Law Firm" noted above. *Id.* at 506.

26. WHITE & TOMKOVICZ, *supra* note 4, at viii.

27. *See, e.g.*, STEPHEN A. SALTZBURG, AMERICAN CRIMINAL PROCEDURE 84, 152, 790 (3d ed. 1988).

28. *E.g.*, JOSEPH D. GRANO, PROBLEMS IN CRIMINAL PROCEDURE (2d ed. 1981).

an excellent job on this score. Nevertheless, they have made other choices that are less laudable. This essay now turns to the task of analyzing these choices.

The text is 837 pages long and covers the "core" subjects of an introductory course on criminal procedure: search and seizure, confessions, identification procedures, and the exclusionary rules.[29] In addition, one topic sometimes covered in first year substantive criminal law courses is included: entrapment.[30] There is, however, no separate coverage of grand juries, discovery, guilty pleas, or bail and preventive detention. These are all critical subjects that can be covered briefly at an introductory level and that have constitutional law aspects;[31] they also are important if any significant emphasis is to be given to white collar criminal practice. Yet the teacher using White and Tomkovicz' text has no option to do so; the "core" is all. This limited coverage will be of concern to teachers who prefer to pick and choose among additional topics of importance to modern criminal procedure.

(1) The Introduction

The book begins with a short textual overview of the steps in the criminal justice system.[32] Unfortunately, this introduction does not include a single document to make concrete for the student what happens at each stage of the criminal proceedings. "Arrest" is mentioned,[33] but there are no arrest reports or Miranda cards. Nor is there any description of the occasional (arguably more than "occasional") contrast between official police procedures and those actually practiced. "Initial judicial appearances" and the "filing of formal criminal charge[s]" are mentioned,[34] but there are no complaints, no intake screening or lineup forms, no excerpts from bail hearings or preliminary hearings. Small portions of these items could be excerpted, included in an appendix, or placed in a documentary supplement.[35]

Such documents at the start of the text would help to set the stage, bettering understanding by linking cases to real things. Later in the text

29. WHITE & TOMKOVICZ, *supra* note 4, at vii (outlining casebook's coverage).

30. *Id.*; *see, e.g.*, PHILLIP E. JOHNSON, CRIMINAL LAW: CASES, MATERIALS AND TEXT 449-71 (4th ed. 1990) (first year text covering entrapment).

31. *See, e.g.*, SALTZBURG, *supra* note 27, at 644-70, 679-828 (covering all these topics, including their constitutional implications).

32. *See* WHITE & TOMKOVICZ, *supra* note 4, at xvii-xxv.

33. *Id.* at xvii.

34. *Id.* at xviii-xx.

35. Many such documents already have been collected in a brief pamphlet, DAVID CRUMP & WILLIAM J. MERTENS, THE STORY OF A CRIMINAL CASE: THE STATE V. ALBERT DELMAN GREENE (1984).

the documents could serve a particularly valuable function; they could be used as the basis for discussing strategy, applying legal principles to "real world" situations, and demonstrating the link and feedback loop that exists among legal theory, negotiation, interviewing, counseling, fact investigation, and trial practice.[36] Inclusion of a few real documents would add much to the learning experience;[37] but as with most criminal procedure casebooks, this feature is lacking in the White and Tomkovicz text.[38]

Nor does the introduction include any discussion of the importance of the realities to come as the course unfolds: of police beatings, fraud, and coercion; of even well-meaning but uninformed or inadequately trained officers violating individual privacy; of the need for a restraining force on the power of the state; of the danger of convicting the innocent; of the need to promote confidence in the justice system by catching and convicting the guilty by *fair* procedures; of careless, incompetent, and otherwise unethical conduct by prosecutors and defense counsel; and of the dangers of an increasingly activist right-wing United States Supreme Court.[39] These matters would serve to do more than simply pique student interest. (Although this in itself is always a worthy goal, for students will not learn if they do not care.) Their mention also would introduce the students to the many conflicting policies and "values" underlying the cases, to ideology and conflict, and to the reality of the system's impact on everyday people.[40]

36. See *id.* at 12-16, 32-34, 66-70, 102-04, for examples of questions effectively relating documents to doctrine and strategy.

37. *See* GARY S. KATZMANN, INSIDE THE CRIMINAL PROCESS (1991). Katzmann's text is fairly lengthy (unlike the brief Crump and Mertens pamphlet, mentioned *supra* note 35) and collects many "real world" documents, including subpoenas, search warrants, grand jury target letters, indictments, plea agreement letters, immunity agreements, and discovery requests. While both Katzmann's text and Crump and Merten's pamphlet are excellent for critiquing real-world documents and studying legal strategy, neither has sufficient detail regarding legal doctrine to substitute for a casebook in an introductory criminal procedure course. See *infra* note 96 for further explanation of Katzmann's text.

38. The strategy of drafting a lengthy casebook introduction that addresses process, philosophy, and tactics, while offering documents from hypothetical cases, has already been effectively implemented by at least one author of an evidence casebook and can serve as an excellent model for doing so in criminal procedure. *See* RONALD L. CARLSON ET AL., EVIDENCE IN THE NINETIES 3-88 (1991).

39. On this last point, see, *e.g.*, Florida v. Bostwick, 111 S. Ct. 2382, 2385-88 (1991) (holding that police boarding of buses at regular stops to search passengers' luggage upon their "consent," but without articulable suspicion that the passengers subsequently searched possessed drugs, did not per se constitute a Fourth Amendment "seizure"); Arizona v. Fulminante, 111 S. Ct. 1246, 1251 (1991) (admission of coerced confession may be harmless error).

40. For an insightful discussion of the significance of analyzing ideology in casebooks, see

Nor does the introduction include any guidance as to *how* students should approach the cases that they are about to read. White and Tomkovicz, like most casebook authors, assume that students will divine an approach by reading and discussing cases without reflecting on the process of *how* to read cases, specifically constitutional cases in criminal procedure. The apparent assumptions are that working with cases will teach students what they need to know and that any necessary framework should be provided by the teacher, not the teaching tool.

The introduction also reduces discussion of the debate about the incorporation doctrine to two pages.[41] This is a defensible choice in that the debate has little current significance for the practitioner. However, this choice might constitute a missed opportunity, as the debate offers an excellent vehicle for discussing precisely the question of how to analyze constitutional criminal procedure cases. The opinions that make up the incorporation debate are a wealthy source of information regarding the role of history and values in constitutional analysis and the breadth of sources relied upon by the courts in justifying constitutional decisions.[42]

Furthermore, the introduction lacks any discussion of the nonconstitutional aspects of criminal procedure. This is no surprise, for the title clearly limits the subject to *constitutional* constraints. But the choice is

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Andrew I. Gavil, *Teaching Antitrust Law in Its Second Century: In Search of the Ultimate Antitrust Casebook*, 66 N.Y.U. L. REV. 189 (1991).

41. *See* WHITE & TOMKOVICZ, *supra* note 4, at xxvi-xxvii. The "selective incorporation" doctrine holds that the Fourteenth Amendment applied some of the protections of the Bill of Rights to the states, but not others. WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE 49-60 (1985). The Justices long debated three additional positions before selective incorporation prevailed: first, that the Fourteenth Amendment incorporated the entire Bill of Rights ("total incorporation"), *see* Adamson v. California, 332 U.S. 46, 68-123 (Black, J., dissenting), *reh'g denied*, 332 U.S. 784 (1947); Rochin v. California, 342 U.S. 165, 174-77 (1952) (Black, J., concurring); second, that the Amendment guaranteed only that process implicit in the concept of "ordered liberty," whether or not contained in the Bill of Rights, *Adamson*, 332 U.S. at 65 (Frankfurter, J., concurring) *Rochin*, 342 U.S. at 166-74; and third, a hybrid of these two approaches ("total incorporation plus"), Poe v. Ullman, 367 U.S. 497, 516, *reh'g denied*, 368 U.S. 869 (1961) (Douglas, J., dissenting); *Adamson*, 332 U.S. at 123-25 (Murphy & Rutledge, JJ., dissenting). *See also* LAFAVE & ISRAEL, *supra* at 36-48. The debate was laid to rest during the 1960s in such well-known decisions as Gideon v. Wainwright, 372 U.S. 335, 342 (1963) (states bound by Sixth Amendment right to counsel), and Malloy v. Hogan, 378 U.S. 1, 6 (1964) (privilege against self-incrimination applies to the states).

42. For discussions of the differing historical views regarding the role of history and values in the incorporation debate, see LAFAVE & ISRAEL, supra note 41, at 49-60; Jerold H. Israel, *Selective Incorporation Revisited*, 71 GEO. L.J. 253 (1982); Leonard Levy, *Incorporation Doctrine, in* CRIMINAL JUSTICE AND THE SUPREME COURT (1990). For a discussion of the various data of and strategies for justifying constitutional decisions, see CHARLES A. MILLER, THE SUPREME COURT AND THE USES OF HISTORY (1969); LAURENCE H. TRIBE & MICHAEL C. DORF, ON READING THE CONSTITUTION (1991); T. VAN GEEL, UNDERSTANDING SUPREME COURT OPINIONS 47-93 (1991).

one that ignores the critical role that the Federal Rules of Criminal Procedure and its state analogues play in modern criminal practice. Also ignored is the increasingly statutory nature of criminal procedure, as exemplified by the Privacy Protection Act of 1980,[43] Material Witness Statutes,[44] Wiretap Acts,[45] and the Bail Reform Act of 1984.[46]

I am not suggesting that all these matters could be covered thoroughly in a single text, or that it is inappropriate to make constitutional criminal procedure the central focus of an introductory course. However, a sensitivity to the existence and usefulness of such statutes could be developed by briefly introducing them to the students, as has been done skillfully in other introductory casebooks.[47] Of course, in depth discussion of any individual statute or rule should await the body of the text, but an introduction should alert the student to the existing types of rules and statutes, indicate where to find and how to use them, and explain how they interrelate with constitutional doctrine.

Additionally, White and Tomkovicz' introduction excludes any discussion of the importance of understanding people in general and the client in particular. How can a defense attorney craft a strategy for a suppression motion without first interviewing the client? How can the attorney develop a defense strategy without consulting the client to learn the client's goals and emotional needs? For example, the client may prefer a quick deal to the lengthy and emotionally draining process of suppression hearings and trial. Must not the competent attorney inquire about witnesses, documents, and other sources of data before suppression strategies can be crafted and dismissal motions contemplated?[48] But neither clients nor other people play any role in White and Tomkovicz' text.

Finally, their introduction is devoid of reference to the ethical codes that govern how criminal lawyers on both sides of the fence should be-

43. 42 U.S.C. § 2000aa (1988).

44. *E.g.*, 18 U.S.C. § 1349 (1988).

45. *E.g.*, Electronic Communications Privacy Act of 1986, 18 U.S.C.A. §§ 2510-2520 (West Supp. 1991).

46. Bail Reform Act, 18 U.S.C.A. §§ 3141-3150 (West Supp. 1991).

47. The best example of such an effort is SALTZBURG, *supra* note 27, at 109-11, 117-20, 151-52, 307-12, 696-705.

48. On the role of clients, people, and human feelings in lawyerly thinking, see D. BINDER ET AL., LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH at xxi (1991) ("[T]he client-centered approach is an attitude of looking at problems from clients' perspectives, of seeing problems' diverse natures, and of making clients *true partners in the resolution of their own problems.*") (emphasis added).

have.[49] The "pervasive method" of teaching ethics holds that ethics must be stressed everywhere in law school so that ethical questions come reflexively to the student's mind.[50] If this method has any merit, as I believe it does,[51] the introduction to a casebook should provoke students to think about such issues when considering the cases and problems that follow. But neither the word "ethics" nor its synonyms appear in this introduction.

In short, as is true of most criminal procedure casebooks, the introduction is treated casually because it merely delays the important task of getting on with the study of appellate cases.

(2) The Body

The body of the text follows a consistent and straightforward pattern. Each section contains an "Introductory Note" briefly offering an overview of what is to come.[52] Such notes are certainly one of the hallmarks of good casebook writing, for the notes offer a roadmap to the reader of what to expect and where the authors want to go. But these notes offer little more, since they do not offer any significant background to illuminate the reader's path.

Some texts offer a discussion of the Fourth and Fifth Amendments' historical roots, treating such material as essential to an understanding of the development and wisdom of legal doctrine in these areas.[53] Similarly, before delving into the case law governing identification procedures, the reader would profit tremendously from a review of the psychological literature on the factors affecting the accuracy of lineups.[54] Nevertheless, such forays into history, philosophy, and social science are rare. Indeed, White and Tomkovicz emphasize in their preface that they have "kept textual material to a minimum,"[55] adding that detailed discussions of such matters are better left to "treatises, hornbooks, and law review arti-

49. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.8 (1983); MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-13, DR 7-103, DR 7-105 (1969).

50. *See* David T. Link, *The Pervasive Method of Teaching Ethics,* 39 J. LEGAL EDUC. 485, 485 (1989).

51. One commentator has described the value of the pervasive method simply: "Ethical responses to particular situations should become instinctive responses, not afterthoughts that are grafted onto the problem. Lawyers need ethical reflexes as part of their day-to-day functioning." Schultz, *supra* note 2, at 9.

52. *See, e.g.,* WHITE & TOMKOVICZ, *supra* note 4, at 1-2, 51-53.

53. *See* SALTZBURG, *supra* note 27, at 38-45, 403-07.

54. *See id.* at 544-57 (summarizing literature). *See generally,* ELIZABETH F. LOFTUS & KATHERINE KETCHUM, WITNESS FOR THE DEFENSE (1991) (explaining psychological principles in layman's terms).

55. WHITE & TOMKOVICZ, *supra* note 4, at vii.

cles."[56] But why is this so? Such discussions are certainly important ones, for they are directly relevant to the creation, application, and criticism of legal doctrine. Are the authors suggesting that it is better to have students go find these things on their own without the casebook's guidance?

If that is indeed the suggestion, it is an unwise one, for it represents a missed opportunity for the teacher to help students learn how to use secondary sources and such sources' analyses of history, philosophy, and social science, in legal planning, strategy, and argument. Equally important, the suggestion that students might go foraging for such literature is unrealistic. When students turn to outside sources, especially after the first semester of law school, they are more likely to turn to commercial study aids than to hornbooks, treatises, and law reviews.[57] The denial that students use study aids is a pernicious fiction that clouds our thinking about teaching, for students are convinced that these materials fill a need that casebooks and teachers do not.[58]

The authors also note that they reduced textual material because they favor "focused questions and brief comments that encourage students to do their own thinking."[59] My own experience in law school, as both a student and a teacher, is that students, faced with the press of preparing for multiple classes and the knowledge that most teachers prefer to frame their own sometimes quite different questions, skip over brief textual questions or give them little thought. In any event, the questions and notes in White and Tomkovicz' text tend to be so short that their presence offers little justification for the exclusion of more helpful textual material.[60]

These comments are not, however, meant to belittle the questions that the authors have drafted. Many of them are quite effective for class discussion. Some offer an excellent basis for an analysis of the metatheory guiding the process by which the Court crafts constitutional principles. For example, *Smith v. Maryland,*[61] held that the use of "pen reg-

56. *Id.*

57. "The key to the Socratic method is that the professor never reveals what the answer is. To get the answer, you have to buy commercial outlines, which cost $16.95 apiece and are written by the professors to provide them with a handsome income on the side." James D. Gordon III, *How Not to Succeed in Law School,* 100 YALE L.J. 1679, 1785 (1991).

58. See KENNETH GRAHAM, JR., CASENOTE LAW OUTLINES: EVIDENCE D-1 (1989), in which a law professor, in an amusing "conversation" with the prospective purchaser of the professor's newly-written study aid, describes the claim that students do not need such aids as a plain lie.

59. WHITE & TOMKOVICZ, *supra* note 4, at vii.

60. *See id.* at 65, 146-47.

61. 442 U.S. 735 (1979).

isters" (mechanical devices that record the numbers dialed on a telephone)[62] does not constitute a "search" within the meaning of the Fourth Amendment. The Court so held because it concluded that any expectation of privacy in the numbers dialed was unreasonable, and only invasions of reasonable expectations of privacy constitute a search.[63] After reproducing *Smith,* the authors pose these questions:

> How did the Court know that "society" was not prepared to recognize the "reasonableness" of actual expectations regarding the privacy of numbers dialed? If a public opinion poll had revealed that a large majority of citizens would recognize the legitimacy of such an expectation, would the Court's analysis and conclusion have differed?[64]

The questions raise the problem of "normative constitutional factfinding," the process of finding "facts" necessary to support the Court's reasoning in crafting and applying constitutional doctrine.[65] The process raises thorny jurisprudential issues, especially about the benefits and limits of using social science in legal analysis.[66] Must the Court rely on society's expectations to determine when the Fourth Amendment is implicated? If so, how should the Court go about determining those expectations? Is the Court's unsupported opinion enough? These are not "academic" questions, in the most pejorative sense of that word, but rather intensely practical ones that go to the nature of good legal reasoning, the tactics involved in crafting persuasive arguments, and the evidentiary question of how to prove constitutional facts that might help your client.

But are the students really likely to think of these additional questions on their own merely from reading the brief, more encompassing questions posed by the authors? More importantly, would not the students and the class discussion benefit from an overall framework of how to answer such questions, a framework that might be criticized and applied in class discussion? Professor David Faigman recently wrote an excellent article that proposes precisely such a framework. Excerpts from that article, for example, would have added much to the notes and questions on *Smith* posed by the authors.[67]

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62. *Id.* at 736 n.1.

63. *Id.* at 740, 743-44.

64. WHITE & TOMKOVICZ, *supra* note 4, at 22.

65. *See* David L. Faigman, *"Normative Constitutional Fact-Finding": Exploring the Empirical Component of Constitutional Interpretation,* 139 U. PA. L. REV. 541, 548-50 (1991).

66. *See id.* at 548-51.

67. *See id.* Professor Faigman's article is offered as an example because it is the best recent effort on these questions, but it may not have been in print early enough to be included in White and Tomkovicz' text. Many other excellent sources, however, have long been available on constitutional fact-finding and the role of social science in that process. *See* JOHN

The authors' notes and questions sometimes take the form of brief hypotheticals that, if considered by the students in advance, would help them to test the limits of legal rules and their underlying rationales. Take the treatment of *California v. Ciraolo,*[68] for example. In *Ciraolo* police flew over Ciraolo's property because they were otherwise unable to confirm a tip that they would find marijuana there. Their flight revealed seventy-three marijuana plants, which they seized. The Court "readily conclude[d]," based in part on the physically nonintrusive manner of the observations and the fact that any member of the flying public could make those same observations, that any expectation of privacy was unreasonable.[69] The authors follow *Ciraolo* with a series of mini-hypotheticals that vary the facts. "If Officer Schultz had climbed a ladder or nearby telephone pole and peered down into Mr. Ciraolo's backyard would the result have been the same? Why?"[70] What if Officer Schultz had "peered through a knothole?" or "unlatched a gate and stepped six inches inside the fence to get a better look . . . ?"[71] "What if he had hovered over the yard in a helicopter?"[72] These questions point out the problems with the majority's reasoning and emphasize the difficulty of drawing a bright-line to determine when an expectation of privacy is "reasonable" and when it is not. Furthermore, the questions point out the inadequate attention given by the Court to crafting a clear, explicit method for making such judgments. Given their brevity, however, these hypotheticals' usefulness as potential teaching aids is no justification for neglecting textual explanations of meta-theory or for failing to reproduce portions of articles that might stimulate clearer thinking in considering these questions.

One final reason is offered for abjuring text: apart from problems and the brief notes and questions, the authors prefer "to allow the Supreme Court to speak for itself."[73] Therefore only United States Supreme Court opinions are used, only the "core analytical elements" of the majority opinions are retained, and only the "significant reasoning of concurring and dissenting opinions" is offered.[74] Some cases are included purely to promote appreciation for the historical roots and evolu-

MONAHAN & LAURENS WALKER, SOCIAL SCIENCE IN LAW: CASES AND MATERIALS 134-250 (2d ed. 1989) (collecting sources).

68. 476 U.S. 207 (1986).

69. *Id.* at 214.

70. WHITE & TOMKOVICZ, *supra* note 4, at 36.

71. *Id.*

72. *Id.*

73. *Id.* at vii.

74. *Id.*

tion of certain doctrines.[75] But note cases "that do not enable students to come to grips with the Justices' reasoning" are sharply limited.[76]

None of this is inherently objectionable. The difficulty is in the insistence on a one note theme, a single way to teach the myriad aspects of legal doctrine and analysis. Though repetition has its value, given the already heavy emphasis in law school on appellate opinions, is it so wrong to offer some variety? One suggestion is to retain the authors' approach for some issues so that in depth analysis of appellate case reasoning is possible. At many points, however, space could be saved by using short textual summaries of leading opinions that need to be addressed.

The space saved could be used for many purposes. A trial court opinion might be reproduced in one section of the book along with the Circuit and Supreme Court opinions, allowing comparisons of the opinions to be made. Brief portions of suppression hearings from leading cases might be included to allow for debate about the lawyers' strategy and the quality of their arguments.[77] Portions of articles critiquing Supreme Court opinions from the perspectives of law and social science or moral philosophy might be used. To frame a debate on ethical issues, interviews with the lawyers from some of the cases might be included, along with relevant portions of the *Model Rules of Professional Conduct.* The point is that there is little reason to limit teaching approaches or course goals to the analysis of appellate opinions, even when dealing with so grand an issue as constitutional criminal procedure.[78]

B. The Problem Method

While the preceding discussion is largely critical of White and Tomkovicz' adherence to the basics of traditional casebook content, one

75. *Id.*

76. *See id.*

77. Professor Rice has followed a similar approach in his evidence casebook. *See* PAUL R. RICE, EVIDENCE: COMMON LAW AND FEDERAL RULES OF EVIDENCE at vii, 34-43 (2d ed. 1990).

78. The perceived "grandeur" of addressing issues of federal constitutional law on a daily basis, and of closely dissecting Supreme Court opinions on those issues—a favorite pastime of professors—may account for the especially powerful hold the case method has in criminal procedure classes. Additionally, because those constitutional opinions involve crime, most students find them intrinsically interesting, and they are therefore likely to spark lively class discussion. But while student enthusiasm is an excellent thing, it must not be mistaken for student understanding, which may be improved by alternative or additional teaching methods. Furthermore, addressing issues such as lawyering strategy, ethical choices, the role of social science, and the art of persuasion, all of which are as central in attaining client goals in constitutional cases as they are in other cases, is arguably every bit as "grand" and important as the parsing of appellate cases.

feature of this casebook that takes it far (though not far enough) from the most traditional model is its extensive and thoughtful use of the problem method.

The problem method is designed to develop the skills of "fact-sorting, issue recognition, and statutory analysis."[79] "Problems," as defined in this essay, differ from "hypotheticals." A "hypothetical" is a fairly narrow set of assumed facts designed to illustrate the application of a specific rule of law, particularly where the rule may be ambiguous or its application to certain situations unclear.[80] A "problem" may serve these functions but also is a more wide-ranging set of facts that serves to illustrate interrelationships among rules or cases and requires a more multifaceted thought process—one closer to that involved in practicing law.[81] Two authors of a problem text explain the advantages of the problem method as follows:

> Unlike the case method where the student is given both a filtered version of the facts and a judge's statement of the relevant issues, the problem method asks the student to determine the issues, evaluate the facts, interpret the law, and draw and defend a conclusion. In short, the student is asked to do many of the things lawyers do each day.[82]

One of the more important aspects of the problem method supporting these claims is simple: students have the written problems before them during nightly preparation, instead of being peppered with new hypotheticals for the first time in class. The problems thus enable students to reflect *before* class on which cases might apply to the problem and why.[83]

Also, the problem method is simply more fun. Most students find it difficult to get excited about case analysis when there are not even simulated clients to worry about. Problems create clients with lifelike dilemmas. Problems give the students a reason to read the cases more carefully—the desire to help their clients. The more enjoyable learning is, the greater the effort that will be put into learning the subject well.[84]

79. NEIL P. COHEN & JAMES J. GOBERT, PROBLEMS IN CRIMINAL LAW at xv (1976).

80. The questions quoted *supra* text accompanying notes 70-72 regarding the *Ciraolo* case are examples.

81. *See* Stephen Nathanson, *The Role of Problem Solving in Legal Education,* 39 J. LEGAL EDUC. 167, 167 (1989).

82. COHEN & GOBERT, *supra* note 79, at xv.

83. *See* Gregory L. Ogden, *The Problem Method in Legal Education,* 34 J. LEGAL EDUC. 654, 655 (1984).

84. *See* Charles R. Calleros, *Variations on the Problem Method in First-Year and Upper Division Classes,* 20 U.S.F. L. REV. 455, 462 (1986) ("Because upper division students are weary of case analysis and are anxious to engage in the kind of problem solving encountered in practice, they generally are enthusiastic about using problems as the primary vehicle for class discussion.").

The problem method has been used in many law school classes for quite some time. It also has made its way into criminal procedure courses, primarily because of a wonderful problem supplement authored by Professor Joseph D. Grano.[85] Curiously, no criminal procedure casebook has incorporated Professor Grano's thorough use of the problem method until now. Although a few problems have been used to great effect elsewhere,[86] only White and Tomkovicz' effort provides adequate material for a teacher to consistently use problems as the basis for class discussion. Moreover, the simple newness of the problems is advantageous, for Grano's text has not been revised in a decade.[87] White and Tomkovicz thus have had the opportunity to include facts based on new cases or areas of stress in the law revealed by more recent decisions. The problems are also plentiful, almost every major subsection of the text being followed by at least six.[88] Placing these new problems throughout a single text and in immediate juxtaposition to the cases offers the advantages of convenience and thrift, for only one text need be purchased.

Most of the problems are lengthy statements of facts, ranging from about half a page to a full page in length.[89] Some of the problems examine ambiguities in the meaning, application, or limits of particular doctrines. Other problems are cumulative, including issues covered in previous sections and providing an effective device for review and a means of developing exam-taking skills.[90] The problems also layer their goals through careful variation of the question posed. Thus, one problem may explore the nature of appellate review and the question of when, if ever, deference must be given trial judges by posing the question: "How

85. *See* GRANO, *supra* note 28.

86. *See* JOSEPH G. COOK & PAUL MARCUS, CRIMINAL PROCEDURE (1986); SALTZBURG, *supra* note 27, at 84, 152, 790. The Cook and Marcus text, it should be noted, made the greatest use of the problem method before publication of White and Tomkovicz' work. Many of the problems in Cook and Marcus are, however, closer to what I have called hypotheticals in this essay. In any event, Cook and Marcus' effort simply does not make as thorough and consistent a use of the problem method as does White and Tomkovicz'. There also is one advanced criminal procedure casebook that makes use of the problem method. *See* CHARLES A. PULASKI, JR., CRIMINAL PRETRIAL AND TRIAL PROCEDURE: CASES AND MATERIALS (1982). White and Tomkovicz certainly make the claim that extensive reliance on the problem method is one of the things that "set[s] . . . apart" their casebook from others in the field. *See* WHITE & TOMKOVICZ, *supra* note 4, at vii. While it is possible that there is another casebook that has in the past, or does now, rely as heavily on the problem method, my own review of the books on my shelves and those of several law school libraries and my discussions with colleagues support White and Tomkovicz' claim.

87. *See* GRANO, *supra* note 28.

88. *See, e.g.*, WHITE & TOMKOVICZ, *supra* note 4, at 45-48, 352-57.

89. *See id.*

90. *Id.* at viii.

Should the Appellate Court Rule?"[91] Another problem shifts emphasis to the trial level by asking: "Should the Motion Be Granted?"[92] Sometimes the focus is narrowed to a single issue, for example: "Were Lindsey's Statements Interrogation [Under the *Miranda* Rule]?"[93] Still other questions focus on the conduct of the police, asking whether the police should have given *Miranda* warnings[94] or should have conducted an automobile search.[95]

If there is a problem with the variety of the questions asked, it is that they are usually phrased objectively in terms of what the "right" answer might be. It would be more interesting to have more open-ended questions asking: "What strategy should the attorney pursue? Which arguments are best for the defense? Which for the prosecution? What further information should be obtained before the defense crafts its strategy, and how might that information be obtained?"

There are also a few problems that depart from lengthy recitation of facts and present the transcript of a conversation. One of the most interesting of these is an entrapment problem that reproduces the transcripts of Philadelphia City Councilmen Schwartz and Jannotti's conversations with two FBI agents posing as arab sheiks in the ABSCAM case.[96] The use of the transcripts makes the problem come alive in a way that fact recitations cannot. Indeed, it would have been even more helpful if there

91. *Id.* at 688.

92. *Id.* at 689.

93. *Id.* at 537.

94. *Id.* at 518.

95. *Id.* at 398.

96. *Id.* at 443-45. ABSCAM was a government undercover operation in which FBI agents posed as employees of a fictional multinational corporation whose principal, a fictional arab sheik, was said to be interested in investing much money in the United States and in emigrating here. *Id.* at 443-44. In the Philadelphia phase of the operation, two FBI agents posing as representatives of the sheik met with Philadelphia City Councilman Schwartz. *Id.* at 444. One of the agents stated that the sheik was interested in building a hotel facility in Philadelphia for 30 to 40 million dollars, but there were potential zoning problems, and he wanted to "take care of" any problems before they arose. *See id.* Schwartz responded by suggesting he could "control" the zoning problems; Schwartz was later paid $30,000 by the "sheik's" representatives. *See id.* In similar meetings with Councilman Jannotti, Jannotti too suggested that he could help the sheik and was thereafter paid $10,000 by the undercover agents. *See id.* at 444-45. Those interested in the details of the ABSCAM operation should read *United States v. Jannotti,* 673 F.2d 578 (3d Cir. 1982), and Gary S. Katzmann's text, *supra* note 37. Katzmann's text should be particularly interesting to law professors, for he uses the real-world ABSCAM case documents to illustrate the institutional (as opposed to doctrinal) aspects of the criminal process, including the "roles played by key actors, the panoply of investigative and prosecutorial tactics, the subtleties of the adversary process, and the nature of the penal sanction." *Id.* at xv.

had been more problems using transcripts or search warrant affidavits, or even the addition of transcript excerpts from actual suppression hearings.

Little purpose would be served by reproducing any of the fairly lengthy problems here. Suffice it to note that *all* the problems are well thought-out, challenging, and interesting. Of particular benefit to someone teaching the course for the first time is the inclusion of a detailed teacher's manual that offers the authors' equally thorough analyses of every problem and case in the book.[97] In short, for professors interested in emphasizing primarily the problem method, there is simply no better single text on the market. For the reasons noted above regarding the advantages of the problem method, this is an important development and helps make the text an effective teaching tool under the dominant model.

What is disappointing, however, is that the use of the problem method does not go far enough. The problems offer the basis for discussing the value-laden, process-oriented questions important to the practicing lawyer (in addition to, not in place of, the traditional doctrinal questions). But this basis is not built upon in a way that departs from the narrow focus of the dominant model of lawyering education. How might a casebook succeed in so departing from the dominant model? It is to this question that this essay now turns.

III. Structuring a Criminal Procedure Casebook for How Lawyers Really Think

The discussion above suggests the contours of a criminal procedure casebook modeled on how lawyers really think. One basic goal of such a text would be to integrate theory and practice in the way that the best practicing lawyers do. A related goal would be to expand the ways in which students learn by doing in order to teach more about how practicing lawyers reason and how they ply their trade. A third goal would be to make the artistry of lawyering as important a subject as appellate case principles. Finally, such a text would seek to teach students to use the

97. *See* WELSH S. WHITE & JAMES S. TOMKOVICZ, CRIMINAL PROCEDURE: CONSTITUTIONAL CONSTRAINTS UPON INVESTIGATION AND PROOF: TEACHER'S GUIDE (1990). On the other hand, the teacher's manual focuses its analyses almost entirely on appellate case analysis and application. The manual does nothing to cure the inattention to artistry, ethics, and other aspects of lawyering that characterizes the casebook itself. What is particularly surprising about this inattention is that Professor White has written one of the best examples of a scholarly study that combines doctrinal analysis with discussion of ethics, social science, and lawyering strategy. *See* WELSH S. WHITE, THE DEATH PENALTY IN THE NINETIES: AN EXAMINATION OF THE MODERN SYSTEM OF CAPITAL PUNISHMENT (1991). Presumably, he has done this because he believes that such discussions are important to scholars and practicing lawyers. But these same discussions are important for students too.

tools of other disciplines, notably the social sciences, in practicing both the science (in the Langdellian sense of appellate case analysis) and the art of lawyering.[98]

A. The Role of Theory

Remember that one of the criticisms of the case method is that it gives students neither express guidance on how to approach legal problems nor "answers" their questions. A casebook might respond to these concerns in three ways: (1) by giving students a roadmap of how to approach particular types of legal problems; (2) by not hiding the black-letter law; and (3) by illustrating the application of legal doctrine to standard lawyering tasks, such as interviewing and negotiating. Regarding this last point, casebooks should use lawyering tasks not only as a way to teach the legal doctrine embodied in cases but also as a way to study the theory of what constitutes performing lawyering tasks well (studying, for example, how a lawyer can interview effectively or how to distinguish between "good" and "bad" negotiating strategy).

(1) How to Approach Doctrinal Problems

First, the theory of *how* to approach classes of problems must be made explicit, but also must be viewed as provisional. The explicit statement of an approach to theory offers students a model for crafting their own theories, but the provisional nature of the theory reminds them that, in examining doctrine and lawyering activities, they must be alert to new strategies for handling an aspect of doctrine and new approaches to learning itself. Explicit attention to learning how to learn is central to this form of pedagogy.

Thus, for example, my earlier critique of White and Tomkovicz' text recommended that the introduction include an explanation of how to read and analyze United States Supreme Court constitutional opinions, particularly those involving criminal procedure. This explicit statement of how to approach a particular class of cases should then guide students, who will know what to look for as they read those cases. But the theory offered must be viewed as provisional, leaving students free to critique whether, given a certain line of cases, the theory makes sense or is complete.

98. Each of these goals can be furthered both in the ways shortly to be discussed and by adding a lengthy introduction on the methodology of criminal lawyering along the lines suggested in this essay's critique of the introduction to White and Tomkovicz' text. *See supra* text accompanying notes 33-51.

At a more specific level, a casebook should offer an explicit statement of theory in each sub-area of criminal procedure to be studied. The "Introductory Notes" that White and Tomkovicz use could be replaced with a series of questions that show how the Court approaches Fourth Amendment problems, confessions, or the right to counsel. The questions would serve as a checklist for students, bringing order and coherence to their analysis of the cases that follow. This checklist could include commentary explaining how the Court's approach has differed in the past, how the approaches of the various present Justices differ, and what the merits and failings of each approach are.[99] Such commentary would encourage a reflective, critical spirit. Moreover, the guidance provided by the checklist-commentary's modeling would lead students to read cases more closely, creatively, and profitably. Importantly, especially for those who choose to practice criminal law, the students will have a model for approaching new case law on their own.

(2) How to Teach Doctrine

As noted earlier, many students turn to "black-letter" study aids as a central, for some primary, means of learning the law. Professors, concerned with the ambiguity of the law that is so central to their endeavor, bristle at this "laziness" and oversimplification. Moreover, experience in research and practice quickly teaches any lawyer that creative use of ambiguity is a good part of what lawyering is all about. Nevertheless, both the bar exam and large portions of most law school exams test the appli-

99. Portions of a question checklist regarding the Fourth Amendment might look like this:

1. Does the Fourth Amendment Apply?
   a. Is there government action?
   b. Is there an invasion of a "reasonable expectation of privacy"?
   c. How does the Court determine whether an invasion of privacy is "reasonable"?
2. If the Fourth Amendment Applies, Whose Privacy Was Invaded? (Standing is the notion that the only proper person to raise a Fourth Amendment claim is the one whose reasonable expectation of privacy was invaded.)
3. If There Was a Fourth Amendment "Search" or "Seizure," Was It "Reasonable"?
   a. What does "reasonable" mean?
   b. Does the Court determine "reasonableness" on a case-by-case basis, or does the Court craft rules for determining "reasonableness" for particular categories of cases?
   c. What are the existing "categories" of rules for "reasonableness"?
   d. When and how will the Court fashion new categories and new rules? (the balancing test).

This is, of course, only a brief segment of one version of what a checklist of Fourth Amendment concerns could include. See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL PROCEDURE 49 (1991), for an alternative checklist. Each question could be followed by brief commentary suggesting potential answers and pointing out things that the students should look for when reading such cases.

cation of black-letter doctrine to hypothetical fact patterns. The students' approach can thus be seen as a rational, albeit incomplete, response to law school's carrot and stick: the grading system.

The study of black-letter principles without an understanding of their ambiguities and without practice in their application will, of course, gain the student little. Moreover, lack of skill in crafting new principles and interpreting cases and statutes—skills generally *not* tested on law school exams but taught, if not necessarily learned, in the classroom—will be even more devastating for the practicing lawyer. But belittling the study of black-letter principles prior to examining their role and limitations in case law divorces the study of law from its practice.

New associates in large firms learn this quickly. It is not uncommon, as was true for me when I graduated from law school, for a young associate to be asked to tackle a complex problem covering numerous areas that are novel to him. For example, antitrust, securities regulation, and administrative procedure may all be involved in a single, complex research problem. When faced with such a task, the new associate first familiarizes himself with the new areas by reading hornbooks, articles, and cases *to learn the black-letter law*. This does not stunt his talents. He uses what he has learned to analyze cases creatively for his client. But he cannot know what the issues are or find the cases or understand them if he has not first learned the black-letter principles.

The lesson is not that traditional law study should be replaced with the memorization of black-letter rules. Rather, it should lead to some presentation of black-letter rules, including an explanation of the ambiguities in those rules and the areas in which no rules have yet been crafted, *before* studying cases. This could be done to varying degrees: several pages of text beginning each section might briefly summarize the rules and note the corresponding cases or lines of cases in a brief outline; alternatively, more thorough statements of black-letter law along the lines of a hornbook might be tried. Either approach requires great selectivity in choosing those cases worthy of classroom discussion to avoid an overly long casebook.

The latter approach has been tried recently in a brand new civil procedure casebook authored by Professors Larry L. Tepley and Ralph U. Whitten.[100] The text is essentially a hornbook, but it is one that includes numerous examples illustrating the application of particular black-letter rules. The text also addresses ambiguities in the rules, discussing histori-

100. LARRY L. TEPLEY & RALPH U. WHITTEN, CIVIL PROCEDURE (1991) [hereinafter CIVIL PROCEDURE].

cal context and difficult policy questions and noting scholarly disputes regarding what the law should be and how it should be applied.[101] The approximately 700 page text (designed for a course of up to 6 credit hours) is supplemented with both a separate problem text and a separate 450 page "Case Supplement."[102] The authors note that they assign the text as background, exploring the issues raised in the text through problems. They note as well that much class time is devoted to close analysis of certain cases or to using problems as a vehicle for exploring the cases.[103]

The introductory criminal procedure course offers a much heavier, perhaps too heavy, emphasis on constitutional law than does an introductory civil procedure course. Nevertheless, the two courses share important features: both involve the use of procedure as a lawyer's tactical tool; both require some in depth analysis of United States Supreme Court constitutional cases; and both should focus some attention on federal rules of procedure and federal procedural statutes. Indeed, it has been suggested that emphasizing the similarities between civil and criminal procedure, as well as the differences, will promote better student understanding of procedure as a lawyer's tool and as a subject of scholarly inquiry.[104] Moreover, this approach more closely mimics the ways in which practicing lawyers absorb and use doctrine to solve novel problems. The success of Professors Tepley and Whitten's experiment in civil procedure calls out for a similar experiment in criminal procedure.[105]

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101. *See id.* at xv-xvi.

102. *See* LARRY L. TEPLEY & RALPH U. WHITTEN, PROBLEMS IN CIVIL PROCEDURE (1991); LARRY L. TEPLEY & RALPH U. WHITTEN, CIVIL PROCEDURE CASE SUPPLEMENT (1991).

103. CIVIL PROCEDURE, *supra* note 100, at xv-xvi.

104. *See* ROBERT M. COVER & OWEN M. FISS, THE STRUCTURE OF PROCEDURE at iii (1979). In their text, Professors Cover and Fiss reflect on why they have departed from the traditional separation of types of procedure:

> In 1974 we began to experiment with the traditional first-year civil procedure course. We were led by two impulses.... The second was to drop the limitation, "civil," and to consider procedure as a unified attribute of law that transcends the traditional professional categories—those implied by the terms "civil," "criminal," or "administrative."

Id. See also ROBERT M. COVER ET AL., PROCEDURE (1988) (a casebook teaching procedure, whether civil, criminal or administrative, as a unified whole).

105. This is not to suggest, however, that professors Tepley and Whitten's text is perfect. They do an excellent job in improving the teaching of doctrine, but do not make a serious effort to direct student attention to other lawyering skills, to ethical concerns, and to the value of other disciplines. Neither do they place sufficient emphasis on learning by doing, for example via writing exercises or simulations. The "perfect" casebook would address each of these concerns.

(3) The Lawyering Process

As discussed throughout this essay, the traditional case method suffers from a selective inattention to much of what lawyers do. Practice at negotiation, counseling, interviewing, drafting, and planning should be part of many "substantive" law school courses. Students also need explicit guidance regarding how to critique and learn from what they do in practicing these tasks.[106] To answer these needs, at least a brief discussion of the theories of what constitutes good and bad negotiating, counseling, interviewing, and fact investigation must be incorporated into standard classroom texts.[107] The goal of integrating these practices into any single course is *not* minimal professional competence; instead the aims are: (1) developing a sensitivity to the legitimacy of those activities as lawyering tasks; (2) learning a framework for critiquing performance of such tasks, thus promoting self-growth; and (3) understanding the value that doctrinal study has for a wide scope of professional activities. If every "substantive" law school class added but one exercise in negotiation and the like, the cumulative effect (particularly if supplemented by a negotiation course or an interviewing and counseling course) would be enormous.[108]

B. Learning by Doing

As has been noted, a properly structured criminal procedure casebook should emphasize learning by doing. This goal requires the inclusion of at least some simulations in the instructional process. Several objections have been raised regarding the use of simulations. Specifically, it has been suggested that: (1) the time required to draft a good simulation is not worth its benefits; (2) some faculty members are uncomfortable teaching particular skills at which they may have had little practice; (3) simulation is a time-consuming exercise which may cut into time necessary to achieve other course goals; and (4) simulations are difficult to conduct in a large class.[109]

106. *See, e.g.*, ANDERSON & TWINING, *supra* note 19 (proposing systematic methodology to guide student fact investigation based on inductive reasoning); Nathanson, *supra* note 81 (proposing an analytical framework for students to use in problem-solving).

107. *See* Gavil, *supra* note 40, at 223 (in antitrust casebooks, " 'lawyering' should be addressed as much as 'law' ").

108. *See* Schultz, *supra* note 2, at 25-26 ("[I]f every member of a faculty agreed to add one contextual exercise in each course, the learning experience of our students would be enhanced immeasurably."). *See also* LEONARD L. RISKIN & JAMES E. WESTERBROOK, DISPUTE RESOLUTION AND LAWYERS at xviii (1987) (containing interviewing, counseling, and negotiation exercises for all the standard first year courses).

109. THOMAS E. GUERNSEY, PROBLEMS AND SIMULATIONS IN EVIDENCE: INSTRUCTOR'S MANUAL at iii-iv (1991) [hereinafter GUERNSEY, INSTRUCTOR'S MANUAL].

Professor Thomas Guernsey has crafted an approach to teaching evidence that seems to address all these concerns. He has written a short booklet, entitled *Problems and Simulations in Evidence*,[110] which is accompanied by an equally short teacher's manual. The booklet includes many problems, some in-class simulations, and some simulations for students to do on their own. This last type of simulation is especially valuable because every class member, not merely the few students selected for an in-class exercise, participates. The simulations often involve "real world" documents and cover interviewing, counseling, and fact investigation.[111] Most of the out-of-class simulations are followed by questionnaires to be read and completed jointly by at least two students working together following completion of the exercise. In this way, students can get immediate feedback on their performance.[112] These questionnaires also can be handed in to the professor before class, enabling him to spot areas where the class may be having particular problems.[113] Additionally, many of the at-home simulations integrate concepts from throughout the course, thus promoting cumulative review.

Professor Guernsey's approach does not require class time for the simulation itself.[114] But class discussion can use the simulations for a wide ranging analysis of: rule-based and constitutional issues; the ethics of negotiation; the artistry of counseling; the client's needs, goals, and feelings; and strategies for fact investigation. Adding even a few such exercises to a criminal procedure casebook, giving the teacher flexibility to choose among one or many such exercises, would add great depth to the analysis of how criminal lawyers think about procedural issues in real contexts.

Professor Guernsey's approach might also be supplemented by one or two case files in the casebook introduction or a documentary supplement that could be the basis for some problems.[115] The documents could include both well-drafted and poorly-drafted products (from both an artistic and a doctrinal perspective), such as indictments, motions to sup-

110. THOMAS E. GUERNSEY, PROBLEMS AND SIMULATIONS IN EVIDENCE (1991).

111. *See* GUERNSEY, *supra* note 110, at v, 7, 92, 95-113.

112. GUERNSEY, INSTRUCTOR'S MANUAL, *supra* note 109, at iv.

113. *Id.*

114. This contrasts sharply with the approach taken by Professor Carlson. *See* RONALD L. CARLSON, ADJUDICATION OF CRIMINAL JUSTICE: PROBLEMS & REFERENCES (1986). Professor Carlson's simulations are designed to be held *in* class. His booklet also is aimed primarily at advanced criminal procedure students, although a few exercises cover topics from the basic course. Furthermore, his work, while artfully executed, is a separate text, not part of and thus not closely tied to the content of a single casebook. *See id.* at xv-xvi.

115. A similar approach has already been followed in at least one evidence casebook. *See* CARLSON et al., *supra* note 38, at 54-65.

press evidence, and briefs in support of such motions. Critiquing such documents in the context of teaching a particular aspect of the course (suppressing suggestive identifications, for example) would offer another means for introducing the complexity of lawyering into the classroom analysis of doctrine.

C. Ethics

While ethics can and should be taught as a separate subject of inquiry, there is a growing sentiment that ethics must be made part of every law school course, taught on an equal basis with other aspects of doctrine and jurisprudence.[116] If students are taught to see ethical dilemmas as a part of every situation, they will learn to react to ethical problems instinctively. Properly conceived, this pervasive study of ethics should include more than just the ABA's *Model Rules of Professional Conduct* and *Code of Professional Responsibility*. It also should include consideration of what is right, just, and fair—although this approach admittedly may lead different students to different answers.[117] The study of ethics should venture beyond the ABA codes for two reasons. First, the ABA codes simply do not answer every ethical question. Second, students who learn models for analyzing the complex, ambiguous, and uncertain issues of morality that plague the practitioner are more likely to become professionals who at least care about such issues, and that alone is a worthy goal.[118]

There is an enormous array of potential ethical issues facing the criminal practitioner. No criminal procedure casebook could begin to address them all, or to do justice to any single such issue. That is why we have separate courses in professional responsibility. But neither breadth nor depth is a necessity. The point is to raise the issues and offer students at least some guidance in resolving them. Therefore, many of the problems in a casebook should raise at least one ethical issue. Similarly, relevant portions of the ABA codes and either excerpts from helpful articles or textual discussion of ethical issues should be sprinkled liberally throughout the casebook. In addition, the teacher's manual should ad-

116. *See* Scott J. Burnham, *Teaching Legal Ethics in Contracts*, 41 J. LEGAL EDUC. 105 (1991); Ian Johnstone & Mary Patricia Treuthart, *Doing the Right Thing: An Overview of Teaching Professional Responsibility*, 41 J. LEGAL EDUC. 75, 87 (1991); Link, *supra* note 50, at 485; Schultz, *supra* note 2, at 8-9.

117. *See* THOMAS D. MORGAN & RONALD D. ROTUNDA, PROFESSIONAL RESPONSIBILITY: PROBLEMS AND MATERIALS 13-21 (5th ed. 1991).

118. *See id.* at 21 ("Few of the problems presented here may be readily answered yes or no."); Link, *supra* note 50, at 485, 488 (the pervasive method trains "compassionate attorneys" in the model of "the lawyer as hero").

dress these ethical issues to make them more accessible to professors who do not teach ethics and who may worry that they lack the "expertise" to lead class discussion of such issues.

Two broad themes might guide the perfect criminal procedure casebook's treatment of ethical questions: first, the difficult tension between the criminal defense attorney's obligations to his client and duty to serve the system of justice; second, the prosecutor's extraordinary responsibilities in comparison to other lawyers.

Illustrative of the first theme are the problems raised by the lying client and the lying witness. A criminal defense attorney must consider the possibility of offering defense testimony, whether from the defendant or from witnesses, at a suppression hearing. While calling the defendant himself may be a risky gamble,[119] it must be considered. This will be especially so where the motion turns on a purely factual dispute: the police claim that the defendant abandoned the drugs when he saw the officers approach, but the defendant says that they searched him while the drugs were on his person; or the police version is that the defendant confessed spontaneously, but the defense version is that the defendant responded to in-custody interrogation before being given *Miranda* warnings. Each of these situations requires that the attorney be alert to both the possibility of his client or witnesses lying and to the related danger of suggesting answers to the defendant while interviewing or counseling him.[120] These situations also serve to remind the students of the client-centered approach—including a focus on client needs and feelings—that characterizes real world lawyering.

119. The "gamble" is risky because a defendant's suppression hearing testimony arguably may be used to impeach the defendant if he testifies at trial. In Simmons v. United States, 390 U.S. 377 (1968), the Court held that when a defendant testifies on the question of standing at a suppression hearing, the government may not use that testimony as substantive evidence of the defendant's guilt or innocence at trial. Commentators have concluded that it is likely, given the way the opinion is written, that the *Simmons* rule extends to all Fourth Amendment questions considered at the suppression hearing, not just to "standing" questions. *See* LAFAVE & ISRAEL, *supra* note 41, at 468; SALTZBURG, *supra* note 27, at 354. However, in United States v. Havens, 446 U.S. 620, *reh'g denied,* 448 U.S. 911 (1980), the defendant denied during cross-examination at trial that he previously possessed a cloth from which a swatch was cut to sew a pocket (in which drugs were found) into a co-defendant's clothing. The prosecution impeached that denial by successfully admitting the cloth, even though the cloth was secured in violation of the defendant's Fourth Amendment rights. The Court's willingness to uphold this use of illegally seized evidence for impeachment purposes suggests that the Court would also permit the use of a defendant's suppression hearing testimony for impeachment evidence at trial. *See* SALTZBURG, *supra* note 27, at 354 (reaching similar conclusion).

120. *See* MONROE H. FREEDMAN, UNDERSTANDING LAWYERS' ETHICS 109-41 (1990) (summarizing lying client and witness problems and potential solutions).

The second theme, involving the prosecutor's unusual obligations, is critical because much of the message of law school is that the adversary system demands a warrior-like mentality; winning overrides all else. This message is particularly inappropriate for future prosecutors who daily witness the win-at-any-cost prosecutorial mindset that is displayed in movies and on television. I have had students express shock and skepticism at the notion that a prosecutor's job is to "do justice," because the only place that they hear that message is in their professional responsibility courses.

It should, therefore, be routine when discussing suppression motions to emphasize that prosecutors cannot bring charges if they lack probable cause.[121] It should be automatic when studying confessions and photo displays to alert students to the dangers posed by police perjury, brutality, coverups, unlawful arrests, and racial discrimination, and to inquire into the prosecutor's role in controlling, and perhaps even prosecuting, such misconduct.[122] It should be reflexive to worry about the duty to reveal exculpatory evidence when discussing the prosecutor's role in presenting such evidence to a grand jury or in discovery.[123] Only such repeated attention to ethical issues in both the casebook and classroom of a constitutional criminal procedure course will instill in students an intuitive understanding that:

> The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer.[124]

D. Criminal Procedure and Social Science

Social science is important to criminal procedure in two distinct ways: in creating constitutional doctrine, and in applying that doctrine to a specific case. These two uses of social science are best understood by illustration.

United States v. Leon[125] is the best known example of the use of social science to create constitutional criminal procedure doctrine. In

121. *Id.* at 222; MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.8(a) (1983).

122. *See* FREEDMAN, *supra* note 120, at 224-25.

123. *See* LAFAVE & ISRAEL, *supra* note 41, at 640-46, 753-64; CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 766 & n.87 (1986).

124. Berger v. United States, 295 U.S. 78, 88 (1935) (Sutherland, J.).

125. 468 U.S. 897 (1984).

Leon, the Court created a good-faith exception to the exclusionary rule for certain searches based upon a search warrant later found to be defective. Central to the Court's holding was its conclusion that a good faith exception would be unlikely to weaken the exclusionary rule's deterrence of police misconduct.[126] Justice Blackmun wrote separately to emphasize the importance of the Court's relying primarily on a deterrence rationale:

> [A]ny empirical judgment about the effect of the exclusionary rule in a particular class of cases necessarily is a provisional one. . . . If it should emerge from experience that, contrary to our expectations, the good-faith exception to the exclusionary rule results in a material change in police compliance with the Fourth Amendment, we shall have to reconsider what we have undertaken here. The logic of a decision that rests on untested predictions about police misconduct demands no less.[127]

Justice Blackmun's opinion makes clear that, as better empirical research develops, a skillful defense attorney may be able to challenge the *Leon* holding in future cases or, at least, to keep *Leon*'s holding limited to search warrants on empirical grounds. Evidence that police misconduct is increasing after *Leon* would justify changing the *Leon* rule. If the Court rejected such evidence, it could do so only by rejecting *Leon*'s logic in favor of a justification that is not empirically-based and yet is defensible.[128]

This latter point raises another related issue. Justice Brennan authored a dissenting opinion in *Leon,* in which Justice Marshall joined, that challenged the wisdom of relying solely on an empirical rationale: "By remaining within its redoubt of empiricism and by basing the rule solely on the deterrence rationale, the Court has robbed the rule of its legitimacy."[129] What Justice Brennan was, in part, referring to was the historical justification of the exclusionary rule on the grounds that it deters police misconduct and preserves the integrity of the judicial system by insulating the court from involvement in police wrongdoing.[130] Ex-

126. *Id.* at 922.

127. *Id.* at 928 (Blackmun, J., concurring).

128. *See* Faigman, *supra* note 65, at 588-89 (articulating similar analysis of *Leon*).

129. *Leon,* 468 U.S. at 931 (Brennan, J., dissenting).

130. *See id.* at 936-43; Mapp v. Ohio, 367 U.S. 643, *reh'g denied,* 368 U.S. 871 (1961). *Mapp* held that the Fourth Amendment exclusionary rule applies in state trials. The Court in *Mapp* articulated the justifications for the exclusionary rule as follows. First, "the purpose of the exclusionary rule 'is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.' " *Id.* at 656 (*quoting* Elkins v. United States, 364 U.S. 206, 217 (1960)). Second, the exclusionary rule is justified by the "imperative of judicial integrity." *Id.* at 659 (*quoting* Elkins v. United States, 364 U.S. at 222). For another interesting suggested use of social science (in addition to that in *Leon*) in

ploring the potential conflict between utilitarian, empirically based rationales and those that focus on basic values fundamental to Fourth Amendment purposes would seem to be an excellent vehicle both for classroom discussion and real-world advocacy.

The second use of social science in criminal procedure—the application of existing doctrine—has already been adverted to in this essay's discussion of the value of examining the psychological literature on the causes of eyewitness misidentifications before studying lineups and photospreads.[131] Similar research has focused on the effect certain intellectual and emotional impairments have on the ability to understand *Miranda* warnings.[132] These areas, and many others,[133] should be of central importance to the modern criminal practitioner.

But the study of these principles is important for another reason. They emphasize that, contrary to the message imparted by the traditional case method, the law is not a clearly bounded discipline distinct from all others. Instead, good lawyering requires the ability and will to attend to other disciplines. Encouraging the development of such an attitude is central to an alternative model of law teaching.

IV. Conclusion

The case method has been extensively and deservedly criticized for failing to offer students sufficient guidance in how to perform their tasks, to address the artistry of lawyering, or to take cognizance of the mul-

crafting constitutional rules of criminal procedure, see Dorothy K. Kagehiro & William S. Laufer, *Illinois v. Rodriguez and the Social Psychology of Third Party Consent,* 27 CRIM. L. BULL. 42 (1991) (discussing discrepancies between judicial assumptions about lay perceptions of risk and consent and actual lay consensus).

131. *See supra* text accompanying note 54.

132. Lanyon, *Psychological Assessment in Court-Related Settings, in* PROFESSIONAL PSYCHOLOGY: RESEARCH AND PRACTICE 260-68 (1986).

133. Particularly interesting to the author is the data gathered by animal behaviorists on factors affecting dog-scenting accuracy, a critical question in the use of dogs sniffing for drugs and in dog scent lineups. *See* Andrew E. Taslitz, *Does the Cold Nose Know? The Unscientific Myth of the Dog Scent Lineup,* 42 HASTINGS L.J. 15 (1990). In a dog scent lineup, a dog sniffs an object known to have been handled by the wrongdoer and then sniffs persons in a line, perhaps "alerting" to one of those persons; the "alert" is offered as substantive evidence that the defendant committed the crime. *Id.* at 17. Other uses of social science by the modern criminal practitioner have included: seeking to establish racial bias in the administration of the death penalty, Marvin E. Wolfgang, *The Social Scientist in Court, in* EXPERT WITNESSES: CRIMINOLOGISTS IN THE COURTROOM 20 (1987); proving insanity and automatism, ROBERT F. SCHOPP, AUTOMATISM, INSANITY, AND THE PSYCHOLOGY OF CRIMINAL RESPONSIBILITY: A PHILOSOPHICAL INQUIRY (1991); and proving the existence of the battered woman and rape trauma syndromes, David McCord, *Profiles, Syndromes, and Other Mental Exotica: A New Approach to the Admissibility of Nontraditional Psychological Evidence in Criminal Cases,* 66 OR. L. REV. 19 (1987).

tifaceted way in which lawyers really think. Even excellent casebooks, like White and Tomkovicz', deserve these same criticisms, for they are the primary tools (apart from the teacher) for implementing the Langdellian case method.

A broad-based response to these criticisms is unlikely to come about in the classrooms if casebook authors do not jettison the fundamental assumptions of the case method. The reason for this is simple: faculty have too many competing demands—for scholarship, individual student counseling, committee work, and public service—to be expected to adopt a new method of teaching in substantive courses without being given new tools to do so.[134] Once casebooks are revised, relatively little additional faculty effort will be necessary and, for this reason, many law teachers might at least consider trying a new approach.

This essay has sought to advance a new approach to teaching law by comparing the image of a fine casebook written in the traditional mold with the image of what an alternative casebook might look like. Having examined the fundamental assumptions of, and the criticisms leveled at, the traditional approach, I have suggested at least some ways to respond to those criticisms. It is hoped that this essay will contribute to the debate about where law teaching should go by focusing attention on an element of teaching that is surprisingly often ignored: the casebook. It is further hoped that some of my colleagues will take up the challenge of writing criminal procedure (and other) casebooks in an alternative mold, for that is, in part, what this essay has sought to achieve.

134. A student reading a draft of this essay noted, "Surely professors share *some* of the blame; after all, they write and create the market for most casebooks." The student is undoubtedly correct, but assigning blame does little to promote change. If professors take up the call to write casebooks (perhaps it would be better to call them "textbooks") in a new mold, it will be easier to persuade professors to try the new approach in the classroom. Moreover, academics are indeed subjected to heavy professional demands (albeit rewarding ones), a reality that makes it unlikely that much of the professoriate can or will change their teaching methods without substantial help in doing so from new casebook authors.